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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 23

ARTHUR M. FRANKE,)
NORMAN G. LINDSEY,)
)
Petitioners)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Respondent)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Arthur M. Franke and Norman G. Lindsey, by counsel, Palmer K. Ward, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in affirming the judgment of the United States District Court for the Southern District of Indiana, upon their conviction of passing counterfeit money in violation of Title 18 U. S. C. section 472.

OPINION OF THE UNITED STATES COURT OF APPEALS

The opinion of the United States Court of Appeals for the Seventh Circuit has not been officially reported but it is reproduced herein in Appendix "A" to this petition.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 7, 1969.

2. A timely Petition for Rehearing was filed and overruled by the Court on April 24, 1969.

3. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Does jeopardy attach in a criminal case when the jury is sworn to try the cause?

2. Does the information furnished by an "unknown informer" coupled with electronically obtained evidence supply requisite probable cause to arrest without a warrant?

3. Were the constitutional rights of petitioners, as guaranteed by the Fourth Amendment to the Constitution of the United States, violated by the use of electronically eavesdropped statements of the accused?

CONSTITUTIONAL PROVISIONS

United States Constitution:

Fifth Amendment:

" No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall an y person be subject for the same offence to be twice put in jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation."

United States Constitution:

Fourth Amendment:

" The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On March 18, 1966 petitioners were charged by indictment with the possession on December 8, 1966 of counterfeited obligations of the United States. On September 19, 1966 the case was called for trial at Terre Haute, Indiana and counsel for petitioners made an oral motion to dismiss the indictment before thejury was sworn to try the cause. The trial Court did not rule on this motion and proceeded to impanel a jury and in fact swore the jury to try the cause.

After the jury had been sworn to try the cause the Court sustained the motion of petitioners and dismissed the indictment without prejudice. On October 13, 1966 appellants were re-indicted by the Grand Jury and charged with the same offense as set out in the original indictment. On August 11, 1967 petitioners filed their Motion to Dismiss the indictment alleging double jeopardy. This motion was overruled by the Court and defendants were found guilty by a jury on September 20, 1967.

Prior to the second trial a timely Motion to Suppress Evidence was filed on behalf of petitioners. A hearing was held on this motion and the witness John Siebert testified in substance that he arrested the petitioners at Terre Haute, Indiana on December 8, 1965 and that prior to the arrest he did not see either of the petitioners commit a felony in his presence; that he did not have a warrant for their

arrest and that he had reasonable cause to believe that they were in fact committing a felony. This belief was based upon what another individual had told him. This informant was one Dallas Barr who was under technical arrest at the time for the possession of counterfeit money. Mr. Siebert testified that he had never used this informant prior to the arrest of the petitioners herein. The informant Barr was furnsihed with an electronic device that he wore around his neck and it enabled the federal agents to hear Mr. Barr's conversations as well as statements attributed to petitioners.

Upon the verdict of the jury finding petitioners guilty the Court sentenced the petitioner Franke to ten years imprisonment and the petitioner Lindsey to six years imprisonment. Said judgments being reproduced herein in Appendix "B" to this petition.

ARGUMENT

The action of the trial Court in causing petitioners to be tried twice for the same offense violates their rights as guaranteed by the Fifth Amendment to the Constitution of the United States, the pertinent part being as follows:

> "* * * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * * * * * "

At the time the trial Judge was examining the jury it became evident that the indictment was faulty and indeed an oral Motion to Dismiss was made by petitioners counsel prior to the Court swearing the jury to try the cause. After the jury was sworn to try the cause the Court sustained petitioners motion to dismiss. As was stated in Cornero v United States (1931) 48 F. (2) 69 (C. A. 9.):

> " The general rule is that, where the jury has been im-

> paneled for the trial of a criminal case, jeopardy has attached, and in such case the plea of former jeopardy should be sustained."

This Court has approved the decision in Cornero in the case of Downum v United States (1963) 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. (2) 100.

The opinion of the United States Court of Appeals for the Seventh Circuit is in direct conflict with the holding in Cornero by the United States Court of Appeals for the Nineh Circuit and is also in direct conflict with the holding of this Court in the case of United States v Ewell (1966) 383 U. S. 116, 86 S. Ct. 773 where this Court held at page 124:

> " The Fifth Amendment provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' That Clause, designed to prohibit double jeopardy as well as double punishment, is not properly invoked to bar a second prosecution unless the 'same offence' is involved in both the first and second trials."

The United States Court of Appeals for the Seventh Circuit, by their decision in this case, has now held that information received from an unknown informer is a sufficient basis for probable cause to arrest persons without a warrant. As the Court said in their opinion:

> " We think the information given to the agents by the "informer" without regard to the eavesdropping evidence was sufficient to establish probale' cause."
>
> " Even though Barr had not been used as an infromant prior to this ocassion, we think that the arresting officers had sufficient reason to believe him."
>
> (Appendix "A".)

We believe this opinion to be in direct conflict with reported opinions of other Circuits and the rulings of this Court. As stated by the United States Court of Appeals for the Ninth Circuit in the case of Costello v United States (1962) 298

F. (2) 99:

> " 'Probable cause' has been defined as 'facts and circumstances * * such as to warrant a man of prudence and caution in believing that the offense has been committed * * * ' Locke v United States, 7 Cranch 339, 3 L. Ed. 364 (1813), Carrol v United States, 267 U. S. 132, 161, 45 S. Ct. 280, 69 L. Ed. 543 (1925). The alleged 'tip' upon which virtually sole reliance is here placed, would, if reliable, have warranted a man of prudence and caution in believing that a narcotics offense had been committed, but the reliability of the informant is the controlling factor." (Emphasis supplied.)

See also Potter v United States (1966) 362 F. (2) 493 where the United States Court of Appeals for the Fifth Circuit stated at page 498:

> " If reliable information is to be the sole and uncorroborated basis of probable cause, it finds no support in the communications of an unknown informer."

This Court held in the case of Beck v Ohio (1964) 379 U. S. 89, 85 S. Ct. 223, 13 L. Ed. (2) 142 at page 96 of the United States reports:

> " An arrest without a warrant bypasses the safeguards provided

> by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. "

This holding in Beck has been reaffirmed by this Court's opinion in Katz v United States (1967) 389 U. S. 347, 88 S. Ct. 507 which also holds that the use of electronic devices is a violation of the accuseds rights as guaranteed to him by the Fourth Amendment to the Constitution of the United States.

CONCLUSION

For the reasons herein stated we respectfully pray the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review their final judgment.

Respectfully submitted,

Palmer K. Ward
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Indianapolis, Indiana

Attorney for Petitioners.

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1968 — JANUARY SESSION, 1969
Nos. 16673, 16674

No. 16673
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ARTHUR M. FRANKE,
Defendant-Appellant.
No. 16674
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NORMAN G. LINDSEY,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

APRIL 7, 1969

Before HASTINGS, *Senior Circuit Judge,* KILEY and FAIRCHILD, *Circuit Judges.*

KILEY, *Circuit Judge.* In a joint jury trial, defendants were found guilty of passing counterfeit money in violation of 18 U.S.C. § 472.[1] Both have appealed. We affirm.

In their joint brief defendants contend the district court violated their rights under the Fifth Amendment Double Jeopardy Clause, and that the court erred in denying their pretrial motion to suppress evidence gained by an unlawful search in violation of their Fourth Amendment rights.

[1] § 472. Uttering counterfeit obligations or securities

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

We find no merit in the double jeopardy contention. The original indictment was returned March 18, 1966. The case was called for trial on September 19, 1966, and defendants filed a motion to dismiss the indictment for insufficiency to state an offense, and during the selection of the jury entered an oral motion to dismiss for a mistake in the date of the alleged offense. The original indictment alleged incorrectly that the offense occurred on December 8, 1966. After the jury was sworn, the indictment was dismissed without prejudice because of the incorrect date. On October 13, 1966, the new indictment was returned, correcting the date of the alleged offense to December 8, 1965, and charging the offense originally charged. On September 8, 1967, the district court denied defendants' motion to dismiss the indictment on the ground of double jeopardy.

We think that since the original indictment was dismissed on defendants' motion the denial of the double jeopardy motion was proper. See *United States v. Ewell,* 383 U.S. 116, 124-25 (1966), where defendants' convictions were set aside on their own motion and the Double Jeopardy Clause was found not to bar retrial for the same offense. See also *United States v. Tateo,* 377 U.S. 463 (1964), where the Court held the Double Jeopardy Clause not violated by retrial of the same alleged crimes after Tateo's conviction on a plea of guilty had been set aside on his motion. It is enough for us to say that here defendants' motions caused dismissal of the indictment—even though the order of dismissal came after the selection of jury—and retrial under the corrected indictment is not precluded by the Double Jeopardy Clause. If, after convictions are overturned at instance of defendants, retrials are not barred by the Double Jeopardy clause, *a fortiori,* defendants' trial under the corrected indictment here is not barred.

Defendants rely on *Downum v. United States,* 372 U.S. 734 (1963). In *Downum* the jury was discharged because the prosecution was not ready to proceed. Pleas of former jeopardy were denied and the Supreme Court reversed. The Supreme Court in *Tateo* said that *Downum* was not inconsistent with the *Tateo* rule. 377 U.S. at 467. Since we follow *Tateo* it follows that our decision is not inconsistent with *Downum. Ipso facto,* our decision here is not

inconsistent with *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931), a case involving facts similar to *Downum*, and which was approved in *Downum*, 372 U.S. at 737. We hold that the district court did not err in denying defendants' motions claiming double jeopardy.

Before the trial under the corrected indictment, the district court denied defendants' motions to suppress evidence obtained by the arresting agents on the ground that they did not have probable cause to arrest. The court's reason for the ruling is that the "informer's" word, corroborated by the electronically gained evidence, furnished probable cause for the arrest of defendants, search of their car, and seizure of counterfeit money. We think the information given to the agents by the "informer" without regard to the eavesdropping evidence was sufficient to establish probable cause.

The "informer," named Barr, was an erstwhile confederate of defendants. He had, a week before arrest of defendants, been himself "technically" arrested on counterfeiting charges and had then begun to cooperate with the Secret Service agents in setting up a meeting with defendants for sale of counterfeit money. His testimony at the trial was substantially the same as that which he gave in the hearing on the motion to suppress. Even though Barr had not been used as an informant prior to this occasion, we think that the arresting officers had sufficient reason to believe him.

Defendants do not argue on appeal whether admission of the agents' testimony at trial regarding what they heard through electronic eavesdropping was fruit of an unlawful invasion of their Fourth Amendment right of privacy. See *Katz v. United States*, 389 U.S. 347 (1967). We have decided to take up this question of the Fourth Amendment violation which has been raised, although obliquely.

We entered an order in this court deferring decision on the case before us pending this court's final decision in *United States v. White*, 405 F.2d 838 (7th Cir. 1969), thinking that decision on this Fourth Amendment eavesdropping question could be affected by the *White* decision. We now find that it is unnecessary to reach the question whether *White* controls here. Assuming, but not deciding, that the testimony of the agents was fruit of an unlawful

invasion of defendants' privacy under the Fourth Amendment, and therefore should not have been considered, we hold that the error in denial of the motion to suppress and use of the testimony at the trial does not require reversal of defendants' convictions. The reason is that—making the assumption we have made—it is our "belief that . . . [the use of the agents' testimony] . . . was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1964). We think this, unlike the situation in *Chapman*, is a case in which "absent the constitutionally forbidden" testimony of the agents, "honest, fairminded jurors could not very well" have brought in not-guilty verdicts.

The principal government witness was Barr. He had known defendants for several years and had previously engaged in an illicit counterfeiting enterprise with them. When he set up the first meeting with Franke and the second meeting with both defendants he was "technically" under arrest for counterfeiting. His evidence about his direct conversations and actions establishing the arrangements for the meetings at which "purchases" were made, the meetings with defendants and incriminating statements made by them, the delivery of the counterfeit money, all established directly or by inference the elements of the offense alleged. There was no evidence to refute Barr's testimony, and his cross-examination was of no consequence.

The testimony of the agents was that some of the conversations they overheard on the Kel-set were inaudible. What they did hear was in fragments. As to some, the speaker was not identified. As to most, the agents' testimony was that what was heard was "something to the effect that," etc.

We conclude that assuming, but not deciding, that a constitutional error was committed by admitting the eavesdropped testimony of the agents, on authority of the rule in *Chapman*, we hold that the error was harmless beyond a reasonable doubt.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX "B"

Petitioner Franke Judgment

"It is Adjudged that the defendant is guilty as charged and convicted.
It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years."

Petitioner Lindsey Judgment

"It is Adjudge that the defendant is guilty as charged and convicted.
It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) years."